STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 12

July 21, 2000

Requested by: **PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY**

Concerning: **DEPARTMENT OF TOXIC SUBSTANCES CONTROL testing procedures and standards for certifying aerosol can treatment and recycling technologies**

Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

ISSUE

Do the testing procedures and criteria utilized by the Department of Toxic Substances Control in the certification of an aerosol can puncturing and recycling device known as the Aerosolv® Model 6000 constitute "regulations" as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the Administrative Procedure Act (Chapter 3.5, Division 3, Title 2, Government Code (commencing with section 11340); hereafter, "APA")? [1]

1. This request for determination was filed by Public Employees for Environmental Responsibility, 2001 S Street, NW, Suite 570, Washington, DC 20009, (202) 265-7337. The Department of Toxic Substances Control's response was filed by Ramon B. Perez, Senior Staff Counsel, Department of Toxic Substances Control, 400 P Street, 4th Floor, P.O. Box 806, Sacramento, CA 95812-0806. This request was given a file number of 99-014. This determination may be cited as "**2000 OAL Determination No. 12.**"

CONCLUSION

Testing procedures and criteria utilized by the Department of Toxic Substances Control in the certification of the aerosol can puncturing and recycling device known as the Aerosolv® Model 6000 are not "regulations" subject to the APA because they are not standards of general application.

ANALYSIS

Background – the Toxics Certification Process

The Department of Toxic Substances Control ("Department") is the California state agency responsible for insuring that hazardous wastes are disposed of pursuant to the requirements of the Hazardous Waste Control Law. (See Health and Safety Code sections 25100 - 25250.26.) One major aspect of this law involves the certification by the Department of technologies designed to mitigate the adverse impact of hazardous wastes. Accordingly, Health and Safety Code section 25200.1.5, subdivision (a), provides in part as follows:

> "(a) The department may establish an administrative process to certify hazardous waste environmental technologies that it determines will not pose a significant potential hazard to human health and safety or to the environment if they are used under specified operating conditions."

Although the Department's decision on whether to certify a particular technology is not subject to the APA, it is required to "adopt regulations to implement the certification process." (Health and Safety Code section 25200.1.5, subdivisions (e) and (j).) These regulations are found in Title 22, CCR, sections 68000 – 68100. In addition, the Department is required to notify the public of its proposed and final decisions regarding certification of a particular technology in the California Regulatory Notice Register. (Health and Safety Code section 25200.1.5, subdivision (c).) Thus, interested members of the public can submit comments concerning the merits of the particular certification.

Aerosol Spray Can Disposal and Recycling Technology

In 1995, the Legislature passed AB 483 which added Health and Safety Code section 25201.1.14 to the Hazardous Waste Control Act. It exempted technologies used for the disposal and recycling of aerosol spray cans from the normal

requirement of obtaining a hazardous waste facility permit. The technology, however, had to first be certified by the Department pursuant to the procedures outlined in Health and Safety Code section 25200.1.5. (See Health and Safety Code section 25201.14, subdivision (a).)

Katec, Inc. was the first applicant to seek certification from the Department for aerosol spray can disposal and recycling technology pursuant to the new procedures outlined in AB 483. The Department subsequently notified the public of its intent to certify Katec's technology which was known as "Model 6000 Aerosolv® Aerosol Can Recycling System." (See *California Regulatory Notice Register 99*, No. 26-Z, June 25, 1999, p. 1278.) After responding to a number of public comments, the Department announced its final decision to certify Katec's technology. (See *California Regulatory Notice Register 99*, No. 44-Z, October 29, 1999, p. 2123 [hereafter "CRNR 99, No. 44-Z"].) It is the procedures, criteria, and protocols used by the Department in that certification which are the subject of this request for determination filed by Public Employees for Environmental Responsibility ("PEER").

Applicability of the APA

A determination of whether the Department's procedures and criteria used in certifying Katec's aerosol spray can technology are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged policy contains "regulations" within the meaning of Government Code section 11342, and (3) whether the challenged policy falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In addition, Health and Safety Code section 25106, found in the Department's enabling legislation, provides as follows:

> "Except as expressly provided by statute, this Chapter does not supersede or modify Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

Thus, unless expressly provided otherwise, the APA applies to the Department's rulemaking. OAL therefore concludes that APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342, subdivision (g), a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this regard, we are mindful of the admonition of the California Court of Appeal in *Grier v. Kizer*, supra:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.[2])

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority*

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2. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of Grier in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. Grier, however, is still good law for these purposes.

(1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

PEER challenges a number of the standards and procedures which the Department used in the certification of the Katec aerosol can disposal and recycling technology. The Department, however, maintains that its testing procedures and criteria are not standards of general application. The Department also frames the issue in terms of the regulatory impact of "*the Katec Certification*." It notes that the "*certification* in the instant case . . . is not a regulation." (Response, p. 9 [Emphasis added].)

We certainly agree that the "certification" of the Katec technology is not a "regulation." It is a specific application of the law to one particular party and is thus not a "regulation" subject to the APA. (See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323 – 324, 253 P.2d 659.)

However, the "regulatory" issue is not the certification per se, but the *procedures, criteria, and protocols* used by the Department as part of the certification process. For example, in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573, 59 Cal.Rptr.2d 186, 196, the California Supreme Court rejected the notion that a policy of general application issued within the context of an adjudicatory proceeding was not a regulation. In discussing an earlier case it noted as follows:

> "We acknowledge that the employer [in the earlier case] challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy of general application and thus a regulation."

The fundamental difference between a case-specific adjudication and policies of general application was also distinguished by the Court in *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104. The Court stated the following:

> "The action under consideration – adoption of guidelines interpreting the Coastal Act's access provisions – *unquestionably falls within the category of quasi-legislative agency action, as opposed to quasi-judicial or adjudicatory proceedings.* [Citations.] The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case." (33 Cal.3d at 168 – 69, 188 Cal.Rptr. at 110 – 11 [Emphasis added].)

Thus, the fact that the rules in question may have originated within the context of a case-specific determination by the Department does not remove them from scrutiny under the APA. An analysis of the general applicability of the Department's certification criteria is still required. To do this, some preliminary discussion of the technology and the testing methods the Department utilized is necessary.

One of the primary purposes of the Katec system is to remove the maximum amount of the liquid and gaseous materials which remain in used aerosol spray cans and minimize the amount which escapes to the atmosphere in the process. To do this, a puncturing and evacuation mechanism caused the liquid and gaseous materials in a can to be either drained into a drum or captured in a carbon-based filter. In the process, a portion of the contents escaped to the atmosphere. An additional portion that could not be extracted remained in the can as residual contents. (See Department's Response, Attachment D, pp. 1, 27.)

To evaluate Katec's system, the Department established several objectives tailored to measure its extraction or removal efficiency. These objectives were as follows:

1) "Removal Effectiveness. (a) Determine the ability of the . . . System to treat aerosol cans to less than 3.0% of the original can contents or capacity, the federal definition of an empty container; (b) Determine the *Removal efficiency* of the . . . System, the percent of the contents in untreated waste aerosol cans that the . . . System removes.

2) System Capture Efficiency. Establish whether the . . . System captures the gaseous and liquid contents removed from the waste aerosol cans ([The Department] used 90% as a capture efficiency target during testing).

3) Carbon Filter Effectiveness. (a) Determine the total mass of the contents from waste aerosol cans processed by the . . . System that results in carbon filter saturation; (b) Measure the total organic vapor concentrations in carbon filter breakthrough emissions to serve as the basis for establishing appropriate criteria for replacement of the carbon filter during operation of the technology; (c) Assess the adequacy of the procedures for determining when the carbon filter is spent and needs replacement.

4) Assess Worker Health & Safety. Determine the capability of the . . . technology to operate in compliance with levels and standards established in state and federal regulations for protection of worker health and safety." (CRNR 99, No. 44-Z, pp. 2125 – 2126 [Emphasis in original].)

The Department then included a number of sampling and statistical criteria to determine whether the subject technology met these objectives. For instance, in determining whether the Katec system could remove all but at least 3% of the contents, the Department had to average the results from testing a specified sample of randomly selected cans. In evaluating these results, the Department established the following criteria:

> "The upper 95% confidence limit of the mean fraction (percentage) of the original contents remaining in the treated cans was determined for each product category. The objective was considered met if the upper 95% confidence limit of the mean was less than 3%, the federal definition of an empty container." (*Id*. at 2127.)

The following similar criteria were established:

1) For determining removal efficiency:

   "The 95% lower confidence limit of the mean removal efficiency for each product category was determined based on the results for the groups of randomly selected treated cans from each test run." (*Id*.)

2) For capture efficiency:

   "The Aerosolv system will be deemed to have met the capture efficiency objective for the particular aerosol can product class, if the lower 90% confidence limit around the mean capture efficiency is equal to or greater than 90%." (Response of Department, "Technology Evaluation Field Test Plan," Attachment "D", p. 6.)

3) For carbon filter effectiveness:

   "The certification condition proposed for requiring replacement of the carbon filter is when total organic vapor concentrations in emissions

from the carbon filter reach 10% of the total organic vapor concentration at the carbon filter inlet." (*Id*.)

4) For worker safety:

"If the data show that operation of the technology results in a potential for exceeding Cal OSHA, OSHA or NIOSH criteria for worker protection, then a condition of certification would be to require appropriate engineering controls, and if necessary air purifying or air supplied respiratory protection for operators." (*Id*. at 8.)

In addition, the Department had to establish a number of other "ground rules" for the certification process including classification of various aerosol spray cans, how many test runs to make, and whether data from various test runs should be grouped or analyzed separately. (*Id*. at 9 - 15.)

PEER takes the position that the criteria and standards used by the Department during the certification process are "underground regulations." It noted in its public comment criticizing the Department's intended certification that:

"Because issuance of a certification to this technology would have regulatory effect, the conditions, assumptions, protocols, and any interpretations of statute upon which they are based, all constitute de facto regulations, and should be promulgated as such pursuant to the [APA]." (Response of the Department to PEER comments, Attachment "B," p. 3.)

As an example, PEER objected to the Department's criteria that "capture" would be defined to exist at the 90 percent level for purposes of certification. (*Id*.) PEER expressed the following concern:

"[T]here is no indication that this objective *will not set a precedent and serve as a hard standard for future aerosol can recycling technology certifications.* Use of a 90 percent 'capture' definition in connection with this certification without independently and publicly establishing a regulatory definition is, therefore, an illegal underground regulation." (*Id*. [Emphasis added].)

However, there is nothing in the record to indicate that the Department has done anything other than establish a particular set of criteria, standards, and testing

protocols specifically for the purpose of certifying the Katec aerosol spray can technology. Admittedly, establishing sampling techniques, numerical standards defining efficiency levels, and statistical confidence limits has a distinct "regulatory" impact, particularly in the absence of pre-existing standards. (See Field Test Plan, Attachment "D" at 1, 19.) But as the Department noted the following in its response to public comment:

> "The protocol developed for testing the Katec Aerosolv system was designed to fit the particular conditions involved with the certification of the device . . . . Although protocols are developed using core scientific principles, each protocol is specific to the device being tested." (Response of the Department, Attachment "B," PEER comments, p. 38.)

While it might seem that utilization of statistical confidence limits would be fairly standard for *any* type of testing or certification, these could be varied depending on nature of sample sizes and the number of test runs conducted. These factors, in turn, could vary from one certification procedure to the next.

One could argue as PEER essentially has that *in future cases,* the Department *might* apply the same standards it used with respect to the Katec Aerosolv system. We cannot, however, base a finding concerning a standard of general application on unknown, future contingencies. For these reasons, the challenged procedures and criteria utilized by the Department are not "regulations" subject to the APA.

Consequently, testing procedures and criteria utilized by the Department of Toxic Substances Control ("the Department") in the certification of the aerosol can puncturing and recycling device known as the Aerosolv® Model 6000 are not "regulations" subject to the APA because they are not standards of general application.

DATE: July 21, 2000

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